Nos. 20,293 - 20,295

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,
vs.
D. I. OPERATING CO.,
a Nevada Corporation, Appellee.

UNITED STATES OF AMERICA, Appellant,
vs.
UNITED RESORT HOTELS, INC.,
a Delaware Corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware Corporation, as successor to WILBUR CLARK'S DESERT INN CO., a dissolved Nevada corporation, Appellee.

UNITED STATES OF AMERICA, Appellant,
vs.
DESERT INN OPERATING COMPANY,
a Nevada Corporation, Appellee.

On Appeal From the Judgment of the United States District Court for the District of Nevada

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BRIEF FOR APPELLEES

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CASES

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the court below is reported at 239 F. Supp. 78.

JURISDICTION

These three cases, consolidated for trial and on appeal, involve the wagering tax under Section 3285 of the Internal Revenue Code of 1939 and Section 4421 of the Internal Revenue Code of 1954. The three corporate plaintiffs were erroneously assessed, successively, a total of $163,310.87 as wagering tax from April 1953 to April 1959, inclusive. The taxes were paid on August 1, 1957, June 20, 1958, and April 29, 1959 (I-R. 46-47); and timely claims for refund were thereafter filed. On March 10, 1960, within the time provided by Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the Internal Revenue Code of 1954, these actions for recovery of tax were brought in the District Court. (I-R. 1-8, 12-15, 18-22.) Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1346. The District Court's memorandum opinion was filed January 4, 1965. (I-R. 28-40). Findings of fact and conclusions of law and judgment were entered on March 24, 1965. (I-R. 41-50.) Within sixty days thereafter, on May 21, 1965, notices of appeal were filed. (I-R. 51-53.) Jurisdiction is vested in this Court by 28 U.S.C. Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that

(a) The wagering tax statute imposing a tax on a wagering pool "conducted for profit" means conducted for a direct profit from the pool;

(b) Treasury Regulations Section 44.4421-1 (c) (4) is invalid in defining a

wagering pool "conducted for profit" in terms of indirect benefits.

2. Whether the District Court erred in finding that appellees did not realize any direct profit from its wagering pools, 90 per cent of which was distributed to the winning bettors, the remaining 10 per cent distributed as a charitable contribution on behalf of all bettors.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, infra.

STATEMENT

Wilbur Clark's Desert Inn (hereinafter "Desert Inn") is a well-known hotel in Las Vegas, Nevada. It was managed and operated successively during the period involved by the three corporate appellees. (I-R. 42-43.)

In the early part of 1952, Mr. Howard Capps, the former tournament director of the Professional Golfers Association (hereinafter "PGA"), was employed by Desert Inn in connection with a plan to construct a golf course. (II-R. 14-15.) During Mr. Capps' prior employment as tournament director of PGA he devised a plan for a tournament that had never theretofore been held, which he called a "Tournament of Champions," in which only those professional golfers who had won a major golf tournament during the preceding twelve months would be permitted to participate. (I-R. 15.)

Immediately after Mr. Capps' employment, Desert Inn determined to put Mr. Capps' plan for a Tournament of Champions into effect. Mr. Capps discussed his plan with the PGA directors, all of whom were very enthusiastic. (II-R. 16.)

After Mr. Capps had secured PGA approval of his plan for the tournament from

the PGA directors, Desert Inn decided to hold a Calcutta in connection with the tournament. (II-R. 16.) Customers of Desert Inn requested the Calcutta, and there were rumors also that other hotels were planning a Calcutta in connection with this tournament. (II-R. 17.) Mr. Capps objected strenuously to having a Calcutta in connection with his tournament. (II-R. 17-18.) In order to remove what Mr. Capps considered the stigma of holding a Calcutta in connection with a Tournament of Champions, it was decided that part of the proceeds of the Calcutta be paid to a recognized charity, and the Damon Runyon Memorial Fund for Cancer Research (hereinafter "Damon Runyon Fund" or "Fund") was selected. (II-R. 18, 22.)

In the negotiations with Mr. Walter Winchell and Mr. Teeter, directors of the Fund, Desert Inn first offered 10 per cent of the Calcutta pool. (II-R. 19.) But Mr. Winchell wanted a guaranteed amount. (II-R. 29.) After a number of discussions with the directors of the Fund, Desert Inn, which did not anticipate that the pool would produce $350,000, agreed that the Fund would receive 10 per cent of the Calcutta pool, or $35,000, whichever was the greater. (II-R. 28-29.)

Desert Inn's expectation that 10 percent of the Calcutta pool would not equal $35,000 was borne out by events; the Calcutta pool was less than $350,000 in each of the years 1953 to 1958, inclusive. The actual figures for all years in which the Calcuttas were held were (I-R. 29):

1953	$ 93,250
1954	137,850
1955	202,500
1956	129,000
1957	265,650
1958	266,000
1959	380,000

Since Desert Inn considered a Calcutta good business, and it needed to overcome

Mr. Capps' strenuous objections to the stigma of a Calcutta in connection with his tournament, it agreed to the expense of the guarantee in excess of 10 per cent of the Calcutta pool. (II-R. 17, 20.)

Mr. Winchell requested that the Fund's name be used on the publicity in connection with the tournament as well as the Calcutta, in order to give the Fund all the publicity possible. (II-R. 74-75, 79.) He wanted the Fund's name shown "wherever and however" it could be in connection with the Tournament of Champions. (II-R. 75.)

The Calcuttas were held in the Painted Desert Room of Desert Inn. (Ex. C.) There was a blackboard on which were listed all the players who were to play in the tournament with a legend showing the 10 per cent for the Damon Runyon Fund and the 90 per cent for the winners of the pool to be distributed in stated percentages. (II-R. 35-36.)

Only persons for whom reservations were accepted were present in the Painted Desert Room on the evening when the Calcutta auction was held. (II-R. 44.) They were all prominent in entertainment and sports. (II-R. 45-46.) As part of the proceedings the welcoming speech included a statement that 10 per cent of the successful bids that night was for the Damon Runyon Fund. (II-R. 36, 54.)

Desert Inn's independent Certified Public Accountants were in charge of and responsible for the financial aspects of the Calcutta. (II-R. 34.) Most of the bidders who did not have their personal checks would use a check form, already prepared by Desert Inn, on which there was a legend

"Calcutta Fund - 90%
Damon Runyon Cancer Fund - 10%"

(Ex. 1, II-R. 36-38.)

Desert Inn requested the Certified Public Accountants to prepare a statement of the tournament operations to submit to the Fund, but gave no indication of what it should contain or how it should be prepared. (II-R. 39.) The statement prepared by the accounting firm combined all the operations of the tournament and the Calcutta, the form of presentation having been decided upon by them. (II-R. 39.) On this statement the guaranteed minimum to the Fund paid in advance was shown as an expense and the offsetting 10 per cent from the Calcutta pool as a receipt. (II-R. 51-53, 62-63.)

The operations of the tournament and the Calcutta, as shown on the statement prepared by the accounting firm annually, resulted in a loss, which was taken as a business deduction for the respective year in issue. (II-R. 55, 62.)

SUMMARY OF ARGUMENT

The Internal Revenue Code of 1939 and the Internal Revenue Code of 1954 provide in identical terms that the wagering tax is imposed on a "wagering pool conducted for profit." There was no definition in the Regulations under the 1939 Code of the words "conducted for profit." In March 1959 the Treasury adopted Reg. Sec. 44.4421-1(c) (4) which defines the words "conducted for profit" to include indirect benefits. The Government has imposed the tax on the pools subject to the 1939 Code and to the 1954 Code on the ground that they resulted in indirect benefits to Desert Inn.

The District Court, in a well reasoned opinion, held that the wagering statutes under both the 1939 Code and 1954 Code were clear and unambiguous and imposed the tax on wagering pools conducted with the expectancy of a direct profit from

the pool.

The District Court relied on the well established doctrine that Congress has a wide range in imposition of excise taxes; that the history of such legislation shows that the selection is in many cases discriminatory; that Congress has often imposed such discriminatory taxes in order to turn economic currents. No excise tax better illustrates the attempt by Congress to turn economic currents than the wagering tax. Gambling is legal in Nevada; it is illegal in most of the nation; therefore gambling profits generally escaped income taxation. The legislative history of the wagering tax statute shows that Congress was imposing the tax on commercialized gambling which had theretofore been comparatively free from taxation by both State and Federal Governments. The wagering tax is thus not only a revenue measure but also a wedge to collect income taxes due on profits from gambling. But the legislative history shows also that Congress expressly excluded from the tax base a pool all the contributions of which are distributed to the winner or winners.

The Treasury relied on Reg. Sec. 44.4421-1 (c) (4) to impose the wagering tax on the pools conducted by Desert Inn, even though all the contributions were distributed 90 cer cent to the winning bettors and 10 per cent on behalf of all bettors as a charitable contribution to the Damon Runyon Fund, for which the bettors were entitled to a charitable deduction. Reg. Sec. 44.4421-1 (c) (4) would impose the wagering tax on a pool not conducted for a direct profit merely because it is a link in a chain of activities, no one of which is conducted for a direct profit, on the ground that at the end of that chain there is increased revenue from a regular business activity, which is, and always has been, subject to income tax. The conclusion

of the District Court that Reg. Sec. 44.4421-1 (c) (4) is invalid was mandated by the words of the wagering statute and its legislative history.

The Government argues in the alternative in its Point II, with no support in the record, that Desert Inn derived a direct profit from the wagering pools. The record, on the other hand, fully supports the following facts:

> Desert Inn had first secured the enthusiastic support of the PGA for the Tournament of Champions idea conceived by its golf professional, Mr. Capps; Desert Inn then decided, for good business reasons, to hold a Calcutta in connection with the tournament; Mr. Capps strenuously objected to a Calcutta because of the stigma of Calcuttas generally; Desert Inn needed to overcome Mr. Capps' objections in order to retain his continued enthusiasm and prevent any unfavorable action by the PGA, which had already approved the Tournament of Champions; Desert Inn therefore offered the Damon Runyon Fund 10 per cent of the Calcutta pool for the use of its name in connection with the Calcutta; the Fund wanted a guaranteed minimum (settled at $35,000) not merely a percentage of a pool, and Desert Inn agreed to underwrite the difference between 10 per cent of the pool and the guaranteed minimum of $35,000, the Fund to receive whichever was the greater amount; Desert Inn was required to meet the guarantee in all years except 1959, the last year a Calcutta was held, when the Fund received $38,000 out

year that 10 per cent of their bids would be paid on their behalf to the Fund as a charitable contribution, the remaining 90 per cent to be distributed among the winners. These record facts amply support the District Court's finding that Desert Inn derived no direct profit from the wagering pools.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY INTERPRETED THE WAGERING TAX STATUTES UNDER THE INTERNAL REVENUE CODES OF 1939 and 1954 AS IMPOSING A TAX ON A WAGERING POOL CONDUCTED FOR A DIRECT PROFIT, AND THAT THE REGULATION UNDER THE 1954 CODE IMPOSING THE TAX ON A POOL THAT RESULTED IN INDIRECT BENEFITS IS INVALID

(a) The wagering tax is an excise tax.

The position of the Government in this case can only be attributed to its ignoring the fact that it is dealing with an excise tax. As this Court said of another excise tax statute in Fisher Flouring Mills Co. v. United States, 270 F. 2d 27 (9 Cir. 1959), in which the opinion of the panel holding for the taxpayer was adopted by this Court en banc as the opinion of the Court, at page 29:

> "This is a new tax not previously imposed. The Congress has a wide range in imposition of excise taxes. The history of such legislation will show that the selection has been in many cases discriminatory. * * * Congress has often imposed such discriminatory taxes in order to turn economic currents. * * *"

No excise tax better illustrates the attempt by Congress to turn economic currents than the wagering tax. Gambling is legal in Nevada; it is illegal in most of the nation; therefore gambling profits generally escaped income taxation.

The wagering tax statute was first enacted in the Revenue Act of 1951 and

became Section 3285 of the 1939 Code. The Committee Reports accompanying that statute show that the wagering statute was directed at commercialized gambling that was escaping taxation.

House Report No. 586, 82d Congress, 1st Session (1951-2 Cum. Bull. 357, 397) and Senate Report No. 781, 82d Congress, 1st Session (1951-2 Cum. Bull. 458, 539) stated that the wagering tax was being imposed because:

> "Commercialized gambling holds the unique position of being a multi-billion dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens."

The District Court stated (I-R. 36):

> "The Court takes judicial notice that Congress passed the Wagering Tax Act not only to raise revenue, but also to aid law enforcement in attempting to suppress wide-spread, nation-wide, illegal gambling activities being carried on in violation of the criminal laws of the several States."

After analyzing the Committee Reports, supra, the District Court said (I-R. 36):

> "It was the intent of Congress to attempt to solve a national social problem, as well as to raise revenue. It was against profits earned from the business of conducting sport books, lotteries, numbers and policy games, as well as wagering pools that Congress took aim."

The District Court therefore interpreted Section 3285 of the 1939 Code and Section 4421 of the 1954 Code as imposing the wagering tax only on a pool conducted for a direct profit. The relevant language is identical in both Codes. Section 4421 of the 1954 Code provides:

"(1) Wager. --The term 'wager' means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit." (Emphasis supplied.)

The word "conducted" in (B) is emphasized since the Government's brief (App. A, page iii) erroneously omits "conducted."

The Regulations under the 1939 Code, Reg. 132, Sec. 325.21 provided:

"(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit."

The relevant Regulation adopted in March 1959 under the 1954 Code, Sec. 44.4421-1 (c) (1), is identical. But the 1959 Regulations include also Sec. 44.4421-1 (c) (4) which provides:

"Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

Of this Regulation the District Court stated (I-R. 37):

"A careful reading of the Wagering Tax Act leads this Court to the conclusion that Congress never intended to tax wagering pools conducted at a loss as trade stimulators."

that

"The Court finds no ambiguity in the statutory language 'conducted

for profit.' There being no ambiguity, there is nothing to construe."

and that:

> "To hold the Regulation (44.4421-1 (c) (4)) valid would require this Court to read the words of the statute in a strained and unnatural sense."

In White v. Aronson, 302 U.S. 16 (1937), also an excise tax case, the Supreme Court, holding for the taxpayer, said at pp. 20-21 that:

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them."

From its language and its legislative history, those expected to obey the statute would find it intelligible only if the wagering pool generated a direct profit to the persons managing and conducting it.

The Calcutta conducted in connection with the Tournament of Champions was a wagering pool the proceeds of which were distributed 90 per cent to the winning bettors and 10 per cent to the Fund as a charitable contribution made by all bettors.

A wagering pool, 100 per cent of which must be distributed to the participants or on their behalf to a charity, is obviously not a wagering pool conducted for a direct profit.

The relevant Committee Reports, supra, (1951-2 Cum. Bull. 398 and 540), stated that

> "The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

The Government (Br. 11) would have this Court read the above language to mean that a "wagering pool with a commercial purpose" is taxable. The Government in the next sentence (Br. 11-12) says:

> "Nowhere did Congress suggest that a lottery conducted for commercial reasons and profit, whether the profit be direct or indirect, fell outside the scope of the tax."

But this case involves a wagering pool, under Sec. 4421 (1) (B), not a lottery under Sec. 4421 (1) (C). Sec. 4421 (1) (C) has two subdivisions dealing with the tax on a lottery, (1) imposing the tax on a wager placed in a lottery conducted for profit, and (2) a definition of lottery, with detailed exclusions from the term "lottery" under (2) (A), if subdivisions (i), (ii), and (iii) are satisfied, and under (2) (B) if the drawing is conducted by a tax-exempt organization.

The purposeful schematic arrangement in the Code of the tax on lotteries with its detailed definitions and exclusions makes clear that Treasury Regulation Section 44.4421-1 (c) (4) lumping the tax on the wagering pool and the tax on lotteries has created an ambiguity with respect to the wagering pool where there is none in the statute.

The Government objects (Br. 13) to the District Court's holding that the term "conducted for profit" required that the "operator of the pool take a share of the gross receipts of the pool itself," as defeating "Congressional intention"; that only the "'friendly' office type pool" was exempt. But the Committee Reports, quoted above, show clearly that Congress was contemplating exactly what the District Court held. The Committee Reports, supra, stated that (1951-2 Cum. Bull. 398, 540):

> "A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege

of contributing to the pool."

Nowhere in the Committee Reports is the statement that only the "'friendly' office type pool" is to be excluded from the wagering tax. The Committee Reports refer only to a pool "organized among friends or other associates, all of the contributions being distributed to the winner or winners." As the District Court opinion stated (I-R. 29; see also Finding of Fact No. VIII, I-R. 43-44):

> "The following facts are not in dispute: * * * On the evening prior to the beginning of the golf tournament, the name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to attend a dinner and the auction in the Painted Desert Room of the Desert Inn Hotel. * * *" (Emphasis supplied.)

This finding establishes that the participants in the Calcutta were clearly within the exclusion referred to in the Committee Reports, supra, namely, friends of Desert Inn, all of them there by invitation, and associated for purposes of this auction, 90 per cent of the proceeds of which was to be distributed among them and the remaining 10 per cent to be contributed on their behalf to a charity.

The further statement by the Government (Br. 13) that this pool was not "one in which 'all' the wagers were returned to the participants," is directly contrary to Finding of Fact No. VIII (I-R. 44) that

> "Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool."

Since the District Court found that 10 per cent of the pool was contributed by the bidders to the Damon Runyon Fund and 90 per cent was paid into the pool and dis-

would argue that this pool was not "one in which 'all' the wagers were returned to the participants."

(b) "Performance for Profit" - Copyright Act Cases.

The Government's main thrust (Br. 10-11, 15, 17-18) is the interpretation of "performance for profit" in the Copyright Act. This is an excise tax case, not a copyright case. The copyright cases involve competing rights of persons, one the owner of the monopolies under the Copyright Act, the other a person who believes he has a right to use what the owner claims to be a monopoly.

In Victor Herbert, et al., v. Shanley Co., et al., 242 U.S. 591 (1917), the Court, per Holmes, J., stated at page 593:

> "These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, chap. 320, §1(e), 35 Stat. at L. 1075, Comp. Stat. 1913 §9517. * * *"

The Court held that defendants had infringed the plaintiff's copyright (p. 594) for:

> "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. * * *"

The opinion continued that the defendants' performances were not eleemosynary, but were part of a total for which the public pays.

In the more recent case cited by the Government (Br. 10), Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F. 2d 303 (3 Cir. 1964), the defendants were authorized to sell the plaintiff's copyrighted records, but in addition

they were piping the music for the entertainment of their customers. The defendant contended that the renditions "were permissible under the Copyright Act because directed to the promotion of the records for the benefit of the copyright owners; that they amounted to 'advertisements' not 'public performance for profit.' " The Third Circuit stated that Sec. 1(e) of the Copyright Act confers two monopolies, that of reproduction by mechanical means and that of giving public performance for profit, that in "enacting the Copyright Act, Congress sought to give the composer or copyright owner control, in accordance with the provisions of the bill, over 'the manufacture and use of such devices' "; that the surrender of the monopoly of mechanical reproduction did not carry with it the second monopoly, the right to publicly perform the copyrighted musical composition through a phonograph recording. The Third Circuit held (pages 305-6):

> "The trial judge affirmatively found that the musical compositions involved were 'publicly performed for profit' * * * 'to make such place of business an attractive place for the patronage of the general public.' Finding No. 4. We believe this factual finding was sufficient basis for his concluding that the renditions in this case amounted to 'public performance for profit' within 1(e) of the Copyright Act.
>
> "The atmosphere created by the playing of recordings made shopping at the Mart more pleasurable and attractive to the patrons. Though this was not of direct pecuniary benefit, it was 'for profit' to the degree that it was commercially beneficial to the Mart to have an attractive shopping atmosphere. * * *"

Chappell & Co., cited by the Government for the proposition that "conducted for profit" in the wagering statute is to be read broadly to give the Government power to tax indirect profits, shows merely how broadly the Courts protect the monopoly of public performance for profit even where there has been a surrender

The wagering tax, on the other hand, is an excise tax and the statute is to be construed narrowly. In Lilly, et al., v. United States, 238 F. 2d 584 (4 Cir. 1956), an excise tax case, the Fourth Circuit, reversing the District Court and holding for the taxpayer, stated at page 587:

> "It is well settled that taxing statutes are strictly construed against the government and in favor of the taxpayer."

Of the excise tax in Fisher Flouring Mills v. United States, supra, this Court said (at page 30) that:

> "it seems clear that the Supreme Court has not abandoned the axiom that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive."

This Court then continued at page 31 that:

> "In virtue of legislative selectivity of objects of taxation, an act levying imposts should not be construed if unambiguous even by the use of adventitious aids ordinarily available. A reference to older cases which crystallize this principle may thus be profitable."

A "reference to older cases" to crystallize the meaning of the words "for profit" without any definition thereof in an excise tax statute is profitable.

(c) "Performance for Profit" - Cabaret Tax Cases.

The cabaret tax cases involving the imposition of the excise tax on amounts paid for admissions to any "public performance for profit," in which the courts held that "profit" meant "direct profit," are clearly in point.

From 1918 to 1942 this tax was imposed on amounts paid for admissions to a "public performance for profit" which were "wholly or in part included in the price paid for refreshment, service or merchandise." Article 11 of Treasury Regulations

43, Example 2, imposed the tax where a hotel maintained in its lobby a dancing floor surrounded by tables and served refreshments to its patrons during the dancing hours, with no charge for dancing. Successive Revenue Acts had been passed since 1918, and the Commissioner's Regulations had continued unchanged throughout that period. The Commissioner lost every litigated case on the ground that where there was no increase in the price charged for refreshments or services there was no direct profit, and "public performance for profit" in the excise tax statute meant a direct profit, not an indirect profit from increased patronage.

Since the Federal courts had been interpreting "public performance for profit" in the 1909 Copyright Act for years prior to the Revenue Act of 1918 imposing the cabaret tax, their refusal to extend the Supreme Court's interpretation of the words "public performance for profit" in the Copyright Act to the excise tax on admissions to a "public performance for profit" is illuminating.

In 1929 the District Court of Colorado held for the taxpayer in United States v. Broadmoor Hotel Co., 30 F. 2d 440, that the supplying of a hotel orchestra for dancing while an afternoon tea was being served was not a public performance for profit subject to the excise tax under the 1918 and 1921 Revenue Acts. The court found that the price paid by the patrons was not excessive; that there was no increase in price attributable to the furnishing of the orchestral dance music; and it held therefore (page 441):

> "It is contemplated that the entertainment referred to shall be conducted for profit and admission charged. But it may be assumed from the statement of facts that 75 cents is not an excessive charge for tea; so, where is any admission charge, and where is any direct profit, found?" (Emphasis supplied.)

In Busey v. Deshler Hotel Co., 130 F. 2d 187 (1942), the Sixth Circuit held the Regulation invalid. The Government attempts to treat as dictum (Br. 15) the holding of the District Court in that case that there was no direct profit and that therefore the cabaret tax was not applicable. The Government says (Br. 16) that "the Court of Appeals in the Deshler Hotel Co. case affirmed without mention of the dictum below." But the Sixth Circuit, at page 192 of its opinion, cited with approval the "well-reasoned district court opinion in United States v. Broadmoor Hotel Co., 30 F. 2d 440, where the facts, though differentiable in non-essentials, bear general similarity to the situation which we have confronted." In Broadmoor Hotel Co., the cabaret tax was held not applicable because there could not be any direct profit subject to the tax. In Deshler Hotel Co., as in Broadmoor Hotel Co., there was no increase in price of food or beverages during the hours dancing was permitted, and therefore there could not be any direct profit subject to the tax.

In Deshler Hotel Co., supra, the Government relied on its administrative interpretation of the cabaret tax in Treasury Regulations, and the reenactment by Congress of the cabaret tax in successive Revenue Acts after the promulgation of the Regulations. But the Sixth Circuit stated (page 191) that since the statutory provision was unambiguous, and the judicial construction was "contrariwise to the administrative interpretation," the administrative interpretation had not become "refrigerated law" because of subsequent reenactment of the statutory provision. Relying on Helvering v. Credit Alliance Corporation, 316 U.S. 107 (1942), the Sixth Circuit stated at page 191:

> "that the regulation not only was contradictory of the plain terms of the subsection but attempted to add a supplementary legislative provision which could only have been enacted by Congress. We

> hold, therefore, that the court below was right in refusing to give effect to the regulation."

And relying on Iselin v. United States, 270 U.S. 245 (1926), also an excise tax case, the Sixth Circuit in Deshler Hotel, stated at page 190:

> "To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute." (Emphasis supplied.)

In Iselin v. United States, supra, the Court, per Brandeis, J., held, where taxpayer had assumed she was subject to the excise tax there involved under one paragraph of the Act, but the Commissioner of Internal Revenue had imposed a larger tax under another paragraph, that taxpayer was not subject to tax under any of the paragraphs, because her activities were not included in the express language of the Act, the Court saying (page 251):

> "What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." (Emphasis supplied.)

The Government in Deshler Hotel, supra, argued the copyright case, Herbert v. Shanley Co., 242 U.S. 591 (1917), to the Sixth Circuit, just as it is arguing that case (Br. 12 et seq.) to this Court. But, as the Sixth Circuit stated in Deshler Hotel, at page 191, the Supreme Court in Herbert v. Shanley Co.

> "merely found infringement of the rights of the owner of a copyrighted musical composition, played by an orchestra in a hotel restaurant where no money was collected at the door."

No better illustration that the copyright cases have no significance in interpreting an excise tax statute is needed than a comparison of the Sixth Circuit's decision in 1925 in the copyright case, Remick & Co. v. American Accessories Co., 5 F. 2d 411, cited by the Government (Br. 11), and the same Circuit's decision in 1942 in Deshler Hotel, supra. In Remick & Co., the Sixth Circuit, relying on Herbert v. Shanley Co., stated that the Copyright Act was directed against a commercial, as distinguished from a purely philanthropic, public use of another's corporation, and at page 412 held that:

> "It is immaterial, in our judgment, whether that commercial use be such as to secure direct payment for the performance by each listener, or indirect payment, as by a hat-checking charge, when no admission fee is required or a general commercial advantage, as by advertising one's name in the expectation and hope of making profits through the sale of one's products, be they radio or other goods." (Emphasis supplied.)

In Remick & Co. there was a public performance for profit merely because there was a commercial use of the performance, irrespective of whether there was direct or indirect benefit; yet in that same Circuit in the later Deshler Hotel case there was no public performance for profit because the commercial use of the performance resulted only in indirect benefits.

After the Sixth Circuit in Deshler Hotel, supra, held that the Revenue Act was plain and unambiguous and that neither the "administrative officers nor the courts may supply omissions or enlarge the scope of the statute," the Treasury asked Congress to amend the statute. The Senate then had for consideration the Revenue Act of 1942, and the Treasury Department requested it to amend the cabaret tax act to include a definition of public performance for profit to conform with the Treasury Regulations. The cabaret tax act as thus amended in 1942 has remained

substantially unchanged, and is to be found in the 1954 Revenue Code as Sec. 4232 (c). In cases arising after the cabaret tax act was amended in 1942 it was held that the amendment was prospective only. Schuster's Wholesale Produce Co., Inc., et al., v. U. S., 49 F. Supp. 909 (D.C. La. 1943); Rogers v. Stuart, 80 F. Supp. 436 (D.C. Ariz. 1945) (for the months February through October 1942, the unamended Act was applicable, but for November 1942 the amended Act applied); Sir Francis Drake Hotel Co. of California v. United States, 75 F. Supp. 668 (D.C. Cal. 1947).

Subsequent to the amendment of the cabaret tax statute to define a performance for profit even where there was no increase in the price of food or services, the Commissioner of Internal Revenue attempted by administrative interpretation to extend further his power to impose the tax. In Revenue Ruling 54-587, 1954-2 Cum. Bull. 376, he had taken the position that payments made for refreshment and service prior to the beginning of entertainment were subject to the tax. He also sought in cases litigated to tax a portion of the amounts collected after entertainment was ended as allocable to the entertainment period. There was extensive litigation; the Commissioner lost every case, the latest in 1963. Lethert v. Culbertson's Cafe, Inc., 313 F. 2d 506 (8 Cir. 1963), where the Eighth Circuit reviewed the history of the tax from its inception. In Revenue Ruling 63-154, 1963-2 Cum. Bull. 541, the Commissioner, after nine years of extended unsuccessful litigation, announced that he was abandoning the position he had taken in Revenue Ruling 54-487, supra.

It is clear that even after the amendment of the cabaret excise tax statute in

increased patronage, the courts nevertheless held the Commissioner strictly within the precise language of the amendment. Thus are excise tax statutes construed strictly against the Government.

(d) "Conducted for Profit" - Wagering Tax Statutes.

When Congress used the words "conducted for profit," without a definition of those words in the wagering tax statute it was obviously using them in their natural meaning and in their ordinary excise tax sense, a direct profit from the pool.

This Court stated of the excise tax statute involved in Fisher Flouring Mills Co. v. United States, 270 F.2d 27 (1959) at page 31, quoting from Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 717, that

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by references to difficulties in administration.'"

The Government (Br. 10) argues that the term "profit" does not require "either a 'net profit' or a 'direct profit'"; but rather "connotes all forms of pecuniary advantage or gain." The Government then argues (Br. 13) that it is well settled that Regulations promulgated by the agency charged with enforcing the law are to be given great weight and should not be overruled unless plainly inconsistent with the statute. The Government's confusion on the subject of "profit" may be due to the fact that all the cases it cites are either income or excess profits tax cases. The Commissioner's Regulations under the income tax and excess profits tax on income are accorded much more weight than are those under the excise tax statutes.

In Irwin v. Gavit, 268 U.S. 161, 166 (1925), the Supreme Court, per Holmes, J., stated that Congress intended to use its income taxing power to the full extent and that net income included "gains or profits and income derived from any source whatever." More recently in Commissioner of Internal Revenue v. Glenshaw Glass Company, 348 U.S. 426 (1955) 429-430, the Supreme Court said of the income tax statute defining gross income:

> "This Court has frequently stated that this language was used by Congress to exert in this field 'the full measure of its taxing power.' * * * Congress applied no limitations as to the source of taxable receipts, nor restrictive la els as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted."

Yet even in Koshland v. Helvering, 298 U.S. 441 (an income tax case), from which the Government quotes (Br. 13-14), the language omitted by the Government in its brief appears on page 447 where the Supreme Court held:

> "But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."

That page on which this omitted language appears was relied on by the Supreme Court to hold invalid another wagering tax regulation in U. S. v. Calamaro, 354 U.S. 351 (1957), where the Court said at pp. 358-359:

> "In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the Regulation can furnish no sustenance to the Statute. Koshland v. Helvering, 298 U.S. 441, 446-447, 56 S. Ct. 767, 769-770, 80 L. Ed. 1268."

Regulation Section 44.4421-1 (c) (4) would impose the wagering tax on a pool which is not conducted for a direct profit, on the ground that it is a link in a chain

of activities, no one of which is conducted for a direct profit, because at the end of the chain there is increased revenue from a regular business activity. This tortured reading of simple statutory language has no support in the Committee Reports and the contemporaneous Regulations under the 1939 Code.

The 1951 Wagering Tax Statute, the Committee Reports accompanying the Wagering Tax Statute, and the Regulations under Section 3285 of the 1939 Code, did not provide a definition of a "wagering pool conducted for profit"; but the Committee Reports expressly excluded a wagering pool all the contributions of which are distributed to the winners. Mr. Mitchell Rogovin, Chief Counsel of the Internal Revenue Service, recently stated that the Treasury Department and the Internal Revenue Service take an active part in drafting legislation and Committee Reports. Addressing the 18th Annual Federal Tax Conference of the University of Chicago Law School in October 1965, reprinted as "The Four R's: Regulations, Rulings, Reliance and Retroactivity," December 1965 TAXES-The Tax Magazine 756, Mr. Rogovin said (page 760):

> "Since the Treasury Department and the IRS take an active part in drafting not only legislation but committee reports as well, the doctrine of contemporaneous construction has a real basis in fact."

The Committee Reports state that the intent of Congress was to reach the multi-billion dollar nationwide gambling business which had theretofore been relatively immune from State and Federal Governments. If Congress had intended to tax a wagering pool, all the contributions of which are distributed to the winning bettors, because the pool served a commercial purpose as a trade stimulator for a legitimate business, the income from which is subject to Federal and State taxation,

the Treasury would have provided the necessary language for the Committee Reports and the contemporaneous regulations under the 1951 Wagering Tax Statute.

Even more significant is the fact that Congress did not provide in the Wagering Tax Statute that "conducted for profit" meant "direct or indirect profit." If Congress had meant to include wagering pools, all the contributions of which are distributed to the winners, because the purpose of the pool was commercial, it would have defined the words "conducted for profit" to include indirect profit.

Appendix C, infra, illustrates thirty-three instances in the Internal Revenue Code of 1954, Subtitle A, imposing the income tax, where Congress specifically provided that the determination was to be made whether the particular result occurred "directly or indirectly." The House Ways and Means Committee and the Senate Finance Committee are completely conversant with the need to use the specific term "indirectly," even in the income tax statute, which is given the broadest possible interpretation by the Treasury and the courts.

The attempted extension of the wagering tax statute by Reg. Sec. 44.4421-1 (c) (4) to impose the tax on a wagering pool "operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits" is as arbitrary as the attempted extension of the cabaret tax statute from 1918 to 1942 to amounts paid for refreshments and service where the "public performance for profit" was given with the expectancy of a profit from increased patronage. And as the Sixth Circuit said of that cabaret tax Regulation in Busey v. Deshler Hotel Co., 130 F. 2d 187 (1942) at page 190, discussed supra, under rubric (c):

> "Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute."

The Commissioner's 1959 Regulation Section 44.4421-1 (c) (4) is not a construction of the statute but "an enlargement of it" and has created an ambiguity where none existed. The Regulation under the 1939 Code contained no such attempted "enlargement," and the ambiguity must be resolved against the Government.

The District Court correctly held that Reg. Sec. 44.4421-1 (c) (4) is arbitrary and therefore invalid.

II

THE DISTRICT COURT FINDING THAT TAXPAYERS HAD NOT REALIZED A DIRECT PROFIT FROM THE WAGERING POOL WAS NOT CLEARLY ERRONEOUS

The District Court found (Finding VIII, I-R. 44) that 10 per cent of the pool

> "was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research."

Despite this finding the Government, with no record references in support, argues (Br. 20) that:

> "The Desert Inn wanted the sponsorship of the Damon Runyon Fund. It agreed to pay $35,000 for this, expecting to recoup a portion of this payment from the Calcutta pool."

Since the bidders, as the District Court found, made the 10 per cent contribution to the Fund, for which they were entitled to a charitable contribution, obviously Desert Inn recouped nothing from the Calcutta pool.

The record supports the following objective facts:

the Tournament of Champions as conceived by Mr. Capps was enthusiastically

approved by the PGA (II-R. 16);

thereafter, because customers of Desert Inn requested it to conduct a Calcutta in connection with the tournament, and because of rumors that other hotels were planning a Calcutta in connection with the tournament, Desert Inn decided to hold a Calcutta (II-R. 16-17);

Mr. Capps strenuously objected to a Calcutta linked with his tournament, and to remove his objections Desert Inn decided to pay 10 per cent of the Calcutta pool to a recognized charity, the Damon Runyon Fund then being selected (II-R. 17-18, 22);

the directors of the Damon Runyon Fund wanted a guaranteed amount of $35,000, and Desert Inn agreed to give the Fund 10 per cent of the pool or $35,000, whichever was the greater (II-R. 29);

the bettors were all informed that 10 per cent of their bets would be paid to the Damon Runyon Fund as a contribution by them (II-R. 36-38, Finding of Fact No. VIII, I-R. 44, Ex. 1).

Desert Inn considered it good business to underwrite the difference between the bettors' 10 per cent of the pool and the minimum of $35,000 demanded by the Fund. (II-R. 20.)

These objective facts prove conclusively that the Fund's name was needed solely to offset the stigma of a Calcutta in connection with the tournament. The Fund's name was obviously not needed to insure the success of the tournament. The success of the Tournament of Champions depended solely on the continued enthusiastic support of Mr. Capps, the creator of the idea, without which continued

the PGA would attract the high caliber sportsmen participants and spectators needed to insure the success of the tournament.

Having agreed to be a guarantor of the difference between 10 per cent of the Calcutta pool and the $35,000 minimum, Desert Inn had no reason for delaying the payment to the Fund until after the Calcutta had been held. Mr. Winchell's desire for as much publicity as possible for the Fund in connection with the Tournament of Champions as well as with the Calcutta fit in with the advertising and publicity program of Desert Inn.

In 1959 when the pool for the first time reached, and exceeded, $350,000, Desert Inn had no expense in connection with the Calcutta. Desert Inn considered the advantages from a Calcutta worth the underwriting cost of removing the Calcutta stigma from Mr. Capps' Tournament of Champions. Since customers and friends of Desert Inn had originally requested the Calcutta, all bettors were informed that 10 per cent of their bets would be contributed by them to the Fund, for which they would be entitled to a charitable contribution.

If Desert Inn had not decided on a Calcutta, it would not have had to spend $25,675 of its own funds in the first year and a total of $100,575 of its own funds in all the years in issue. (When in 1958 Desert Inn protested a proposed deficiency of more than $1,020,000 for the years 1953-1955, its guaranteed expense for those years in excess of 10 per cent of the Calcutta, or $61,640, was obviously not a charitable contribution, as contended by the Government, but an ordinary and necessary business expense (Ex. 4, II-R. 98-99) , and the deduction was ultimately allowed.

The accounting treatment by Desert Inn's Certified Public Accountants of the

$35,000 paid in advance by Desert Inn as guarantor and of the 10 per cent owed to Desert Inn by the Calcutta pool for the charitable contribution made by Desert Inn on behalf of all the bidders, is irrelevant for purposes of this case. District Court Finding VIII (I-R. 44) states that

> "The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research."

Since Desert Inn advanced the 10 per cent on behalf of the bidders, the repayment of that advance was so treated by the Certified Public Accountants on the statement prepared by them for submission to the Damon Runyon Fund.

The Government argues (Br. 20), with no support in the record, that in substance Desert Inn's position with respect to the Calcutta is to be likened to a department store that runs a pool and keeps 10 per cent of the pool to help defray the cost of newspaper advertisements for the store. The District Court's finding is exactly contrary. Finding of Fact No. VIII states:

> ".... Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten percent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool." (Emphasis supplied.)

The District Court found that the "remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool." There is no support either in the record or the findings for the Government's statement (Br. 21) that

> "In any event, whether the $35,000 payment was for sponsorship of the Tournament or for sponsorship of the Calcutta, it was a

> business expense and the Inn was repaid a part of that expense with its ten percent share of the pool." (Emphasis supplied.)

The Government has spun a theory out of thin air as its premise, and from this premise, contrary to the record and the District Court's findings, the Government concludes (Br. 21) that this "was as surely a direct pecuniary profit to the Desert Inn from the conduct of the pool, as if the ten percent share had been used to put the putting greens in shape or to pay a part of the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction."

The Government not only seeks to impose the wagering tax on an exempt pool, but even says that Desert Inn perpetrated a fraud on the contributors to the pool when they were advised they could take a charitable deduction for the 10 per cent that was being paid to the Damon Runyon Fund; that if they took such a charitable contribution they would have been guilty of tax fraud, since they were in effect paying for the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction. Merely to state the Government's theory of a direct pecuniary profit is to refute it. Desert Inn was not a merchant retaining part of the pool to defray a portion of the expenses of holding the event but a trustee-obligee of the Calcutta; a trustee as to the 90 per cent it was required to distribute among the winning bettors in the percentile shares previously agreed upon; an obligee of all the bettors as to the 10 per cent of their bets which it had already paid on their behalf to the Damon Runyon Fund as a contribution, for which the bettors were entitled to a charitable deduction.

The District Court Finding No. XIII (I-R. 45) that Desert Inn did not realize any direct financial benefit or profit from the Calcutta pools must be sustained

unless clearly erroneous. It is submitted that this finding is amply supported by the record and is clearly correct.

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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J. A. DONNELLEY

/s/ J. A. DONNELLEY

Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Curcuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. A. DONNELLEY

APPENDIX A

Internal Revenue Code of 1939:

SEC. 3285 (as added by Sec. 471 (a), Revenue Act of 1951, c. 521, 65 Stat. 352). TAX.

(a) Wagers. - There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. - For the purposes of this chapter -

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers. (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of Wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons Liable for Tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3285).

Internal Revenue Code of 1954:

SEC. 4401. IMPOSITION OF TAX.

(a) Wagers. - There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable for Tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person, who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(26 U.S.C. 1958 ed., Sec. 4401).

SEC. 4421. DEFINITIONS.

For purposes of this chapter -

(1) Wager. - The term "wager" means -

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery. - The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include -

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(26 U.S.C. 1958 ed., Sec. 4221).

Treasury Regulations 132 (1939 Code):

Sec. 325.20 Effective period. The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

Sec 325.21 Scope of tax. (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.

(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

(d) A sports event includes every type of sports event, whether amateur, scholastic, or professional, such as horse racing, auto racing, dog racing, boxing and wrestling matches and exhibitions, baseball, football, and basketball games, tennis and golf matches, track meets, etc.

(e) A contest includes any type of contest involving speed, skill, endurance, popularity, politics, strength, appearances, etc., such as a general or primary election, the outcome of a nominating

convention, a dance marathon, a log rolling, wood chopping, weight lifting, corn/husking, beauty contest, etc.

* * * * * *

Treasury Regulations on Wagering Tax (1954 Code):

Sec. 44.4421-1 Definitions.

(a) Wager. The term "wager" means -

(1) Any wager placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest;

(2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and

(3) Any wager placed in a lottery conducted for profit.

* * * * * *

(c) Other terms used -

(1) Wagering pool. A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

* * * * * *

(4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

(26 C.F.R., Sec. 44.4421.1).

APPENDIX B

EXHIBITS

Plaintiffs'	Identified	Offered	Received
1	II-R. 38	II-R. 38	II-R. 38
2	II-R. 93	II-R. 93	II-R. 93
3	II-R. 93	II-R. 93	II-R. 93
4	II-R. 93	II-R. 95	II-R. 96
Defendant's			
A	II-R 24	II-R. 24	II-R. 24
B	II-R. 42-43	II-R. 42-43	II-R. 43
C	II-R. 42-43	II-R. 42-43	II-R. 43
D	II-R. 50-51	II-R. 51	II-R. 51
E	II-R. 63-64	II-R. 64	II-R. 64
F	II-R. 64	II-R. 64	II-R. 64
G	II-R. 64	II-R. 64	II-R. 64
H	II-R. 64	II-R. 64	II-R. 64
I	II-R. 64	II-R. 64	II-R 64
J	II-R. 64	II-R. 64	II-R. 64
K	II-R. 74	II-R. 74	II-R. 74
L	II-R. 81	II-R. 81	II-R. 81
M	II-R. 82	II-R. 82	II-R. 82
N	II-R. 84	II-R. 84	II-R. 85
O	II-R. 85	II-R. 87	II-R. 87
P	II-R. 85	II-R. 87	II-R. 87

APPENDIX C

Section 267 (a); (b); (c); (d), inclusive
" 302 (c) (2) (B)
" 318 (a)
" 501 (c) (16)
" 503 (c)
" 503 (i)

" 521 (b) (2)
" 542 (a) (2); (c) (6) (D); (c) (7) (B); (c) (8)
" 543 (a) (6); (a) (7)
" 544 (a)
" 552 (a) (2)

" 553 (a) (5); (a) (6)
" 544 (a)
" 958 (a) (2); (b) (2)
" 1239 (a)
" 1249 (e) (2)

" 1249 (b)
" 1504 (d)
" 1551 (a) (2)
" 1563 (e) (2); (e) (3); (e) (4); (e) (5); (e) (6)